RIGHT OF HUSBAND TO RECOVER ALIMONY INDEPENDENT OF AN ACTION FOR DIVORCE.—A recent decision which has attracted far more than the customary interest among the laity and has subjected the court rendering it to a considerable amount of criticism, besides furnishing the basis for no end of humor throughout the country, is that handed down by the Supreme Court of North Dakota on November 25, 1911, in the case of *Hagert* v. *Hagert* (N. D. 1911), 133 N. W. 1035. In this case it was held that a husband may properly bring an action, unconnected with divorce, against his wife to compel her to support and maintain him when she is amply able to do so, and has not been deserted or abandoned by him, and when he, because of age and infirmity, is unable to gain his own livelihood.

Briefly the facts in the case are these: Plaintiff, who was married to defendant more than thirty years ago, is a man of fifty-five years, unable to work and feeble beyond his years as the result of paralysis. Defendant, on the other hand, is wealthy, her separate estate being valued at approximately thirty thousand dollars. Besides plaintiff she has dependent upon her only a twelve-year-old son. Plaintiff has not deserted defendant but she refuses him maintenance. Plaintiff in his bill in this action asked money for necessaries, pending the determination of the controversy, money for attorney's fees and monthly payments for his support. He was successful in the District Court of Grand Forks County and defendant appealed.

The Supreme Court based its affirmance of the decision of the lower court on two grounds, either one of which, it stated, was sufficient to support the ruling. First it argued that it is no objection that there is no precedent at Common Law for this action, since the advance of woman has thrown an entirely new light upon the relation of husband and wife; that at the time of the adoption of the Constitution of the State in 1889, it was a well recognized principle of equity that a wife might sue for alimony, independent of an action for divorce, and that the right so to sue is continued to her under the provision of Section 103 of the Constitution, conferring upon the district courts, jurisdiction of all cases "both at law and equity," and that the reasoning which allows a wife to recover alimony applies equally to a husband, when there is considered the comparative equality of husband and wife under modern statutes.

As the basis of its second ground of affirmance the court quotes the following sections of the Code of 1905 of North Dakota:

"§ 4077—A husband must support himself and his wife out of his property or by his labor. A wife must support her husband when he has not deserted her, out of her separate property, when he has no separate property and is unable to support himself.

"§ 4078—Except as mentioned in Section 4077, neither the husband nor the wife has any interest in the property of the other but neither can be excluded from the other's dwelling."

On these statutes it bases the argument that the husband has an inchoate interest, to the extent of his support, in the estate of the wife, and that he therefore has a property interest as an additional matter for equitable cognizance.

One of the indispensable steps by which the North Dakota court supports its first ground of affirmance is its conclusion that, at the time of the adoption of North Dakota's constitution, courts of equity, by the weight of authority, recognized the right of the wife to maintain an action for alimony, independent of divorce proceedings. In this statement the court attempts the decision of one of the most controverted points in equity jurisprudence.

There is no doubt that the earliest rule in England was directly to the effect that such an action was not allowable, but as early as 1632 there was an apparent recognition of a right very closely akin to that contended for in the principal case. *Lasbrook* v. *Tyler* (1632), 1 Ch. Rep. 24. There the plaintiff "sought to be relieved of defendant Tyler, her husband for allowance to be given her for maintenance, for all the time she departed from him." The court allowed her the maintenance. In *Williams* v. *Callow* (1717), 2 Vern. 752 the analogy to our case is more marked. There the court decreed the interest of a trust bond given for the wife's portion, to be paid to the wife for her separate maintenance. *Watkyns* v. *Watkyns* (1740), 2 Atk. 97, which followed very closely, resulted from a bill brought by a wife for "maintenance out of her fortune upon a suggestion of very cruel usage without any provocation on her side." Said HARDWICKE, L. C.: "As it appears to the court that the husband has possessed himself of the greater part of the wife's fortune and is gone out of the kingdom without leaving a provision or maintenance for her, I decree that interest arising from the trust money shall be paid to her until he thinks proper to return and maintain her as he ought." Of these three English cases which have, almost alone, influenced the trend of the American decisions, it is certain that the latter two are independent of divorce actions. In the first, however, it is not certain that the prayer for alimony was not coupled with a prayer for divorce.

The pioneer American case on the subject is *Butler* v. *Butler* (1823), 4 Litt. 202. Said the court in that case, citing the English cases previously mentioned: "We therefore conceive that the chancellor, before the statute and since, in cases not embraced by it, which have strong moral claims, had and has jurisdiction to decree alimony, leaving the matrimonial chain untouched." Other early cases in this country holding the same rule are: *Galland* v. *Galland* 38 Cal. 265; *Garland* v. *Garland,* 50 Miss. 694; *Glover* v. *Glover,* 16 Ala. 440, and *Prather* v. *Prather,* 4 Desaus. (S. C.) 33.

Regarding the present rule in this country, in 2 AM. AND ENG. ENCYC. OF LAW (Ed. 2) 93-94 is this statement: "It is maintained at present, by the weight of authority that, in the absence of legislation to the contrary, alimony should not be allowed in an independent suit in courts of equity." If one is to measure the weight of authority by sheer number of jurisdictions applying the various rules it is extremely doubtful if the statement just quoted may be accepted as absolutely correct. A careful examination shows the following cases supporting the right of the wife to recover in an independent action: *Brewer* v. *Brewer,* 79 Neb. 726, 113 N. W. 161, 13 L. R. A. (N. S.) 222; *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459; *Williams* v. *Williams,* 136 Ky. 71, 123 S. W. 337; *Parker* v. *Parker,* 134 Ga. 316, 67 S. E. 812; *Christopher* v. *Christopher,* 18 S. C. 600; *Graves* v. *Graves,* 36 Iowa 310, 14

Am. Rep. 525; *Clisby* v. *Clisby,* 160 Ala. 572, 49 South. 445, 135 Am. St. Rep. 110; *Milliron* v. *Milliron,* 9 S. D. 181, 68 N. W. 286, 62 Am. St. Rep. 863; *Baier* v. *Baier,* 91 Minn. 165, 97 N. W. 671; *Edgerton* v. *Edgerton,* 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. Rep. 557; *Dye* v. *Dye,* 9 Colo. App. 320, 48 Pac. 313; *Almond* v. *Almond,* 4 Rand. 662, 15 Am. Dec. 781; *Butler* v. *Butler, supra; Galland* v. *Galland, supra; Garland* v. *Garland, supra; Glover* v. *Glover, supra, and Prather* v. *Prather, supra.*

The following are to the contrary effect: *Chestnut* v. *Chestnut,* 77 Ill. 346; *Moon* v. *Baum,* 58 Ind. 194; *Carroll* v. *Carroll,* 42 La. Ann. 1071; *Littlefield* v. *Paul,* 69 Me. 533; *Adams* v. *Adams,* 100 Mass. 365; *McIntire* v. *McIntire,* 80 Mo. 470; *Parsons* v. *Parsons,* 9 N. H. 309, 32 Am. Dec. 362; *Nichols* v. *Nichols,* 25 N. J. Eq. 60; *Atwater* v. *Atwater,* 53 Barb. 621; *Rees* v. *Waters,* 9 Watts 90; *Prosser* v. *Warner,* 47 Vt. 667.

In North Dakota the precise point had not, previous to this case, been decided. *Bauer* v. *Bauer,* 2 N. D. 108 allowed alimony independent of divorce, but it did so under Chapter 167 of the SESSION LAWS of 1890. Of that statute the plaintiff in this action sought to take advantage, but the court refused to decide whether or not it was in force, preferring to place its decision upon the two points mentioned previously. It seems very possible, however, that, despite its statement regarding the statute, the *Bauer* case may have exerted considerable influence upon the decision of the North Dakota court in our principal case.

It is very probable, then, that the North Dakota court correctly viewed the weight of authority at the time of the adoption of its constitution.

This troublesome point decided, the court proceeds to apply the reasoning, which first led courts of Chancery to recognize the right in a wife to sue for alimony independent of an action for divorce, to the situation in this case, with a husband as suitor. This extension of the doctrine it would justify partially on the authority of *Livingston* v. *Superior Court,* 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175. That case, however, seems scarcely in point in the North Dakota case. There a husband had sued his wife, and an injunction had issued to restrain her from conveying property to defeat any judgment which might be found against her. She did convey, however, and the court adjudged her guilty of contempt. The appeal was solely on the question as to whether her action justified the court in holding her in contempt, and the expression to the effect that the husband may maintain such action for alimony was mere *dictum.*

In support of its second point, the court attempts the citation of no cases, arguing from the wording of the statutes as set out previously, that the husband acquired a property right in the wife's estate which a court of equity should enforce.

The court, it seems, might well have added strength to its decision by pointing out the analogy to the case where one seeks divorce and alimony, and by calling attention to the well defined rules governing a husband in such cases. In 34 L. R. A. 110 it is said, on this point: "The tendency is to place husband and wife on an equality on this question as the rights and

powers of the wife expand and the respective rights and powers of the husband contract, and alimony has been given the husband in some cases."

In cases where the wife was considered at fault, alimony has been extended to include land bought with the proceeds of property belonging to the husband, *Stewartson* v. *Stewartson,* 15 Ill. 146; an equitable share where, through the wife's misconduct she has got title to all his property and driven him from the premises, *Snodgrass* v. *Snodgrass,* 40 Kan. 494; in cases where the husband has been held to be at fault, alimony has also been given him. *Fitts* v. *Fitts,* 14 Tex. 443.

Statutes have generally, nowadays, given the husband rights in his wife's property upon divorce, and many of these have allowed him alimony and maintenance. Typical statutes are: N. H. Pub. Stat. 1891, Chap. 175, Sec. 17; Batt. (N. C.) Rev., Chap. 37, Sec 9; R. I. Pub. Stat. 1882, Chap. 167, Sec. 4; Vt. Gen. Stat. 1870, Chap. 70, Sec. 36. W. R. M.